Supreme Court, U.S.
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NOV 20 1982
ALEXANDER L. STEVAS
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No. 81-2368

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

ALEX J. ARMIJO, Commissioner
of Public Lands for the State
of New Mexico,

Petitioner,

v.

ROGER A. JENSEN, PATRICIA
BREMER, and GEORGE B.
McCUTCHEON, II,

Respondents.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NEW MEXICO

BRIEF OF RESPONDENTS ROGER A. JENSEN, PATRICIA BREMER, and GEORGE B. McCUTCHEON, II

Ronald J. Segal
Counsel of Record

Irwin S. Moise

SUTIN, THAYER & BROWNE
A Professional Corporation
P. O. Box 1945
Albuquerque, New Mexico 87103
(505) 842-8200

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TIME FOR FILING RESPONSE TO PETITION

Respondents received three copies of the Petition for Writ of Certiorari in this action by hand-delivery on June 28, 1982. Respondents' Brief in Opposition to the Petition for Writ of Certiorari is therefore due on or before July 28, 1982, pursuant to Rule 22.1 of the Supreme Court Rules.

REQUEST FOR DAMAGES AND COSTS

The Petition for Writ of Certiorari in this action is frivolous, as the United States Supreme Court clearly lacks jurisdiction to entertain the petition. Respondents therefore ask this Court to award appropriate damages to respondent pursuant to Rule 49.2 of the Supreme Court Rules, plus

interest and costs pursuant to Rule 49.1 and Rule 50.1 of the Supreme Court Rules.

THE UNITED STATES SUPREME COURT LACKS JURISDICTION TO REVIEW THE DECISION OF THE NEW MEXICO SUPREME COURT IN THIS ACTION BECAUSE THE DECISION RAISES NO FEDERAL QUESTION

This Court's jurisdiction to grant the writ of certiorari requested by petitioner is governed by 28 U.S.C.A. § 1257(3) (West Supp. 1982). Both that statute and Rule 17 of the Supreme Court Rules, governing review on writ of certiorari, require that this Court will not consider a petition for writ of certiorari to a state court of last resort unless: (a) a federal question has been decided by the state court in a manner

in conflict with a state or federal court decision; or (b) the state court has decided an important question of federal law which should be settled by this Court. In the context of this case, because no United States constitutional right or treaty is involved, a reviewable federal question will have been presented only if the New Mexico Supreme Court decision has directly "drawn into question" the validity of a federal statute, or if a party to the action claimed a right or title under a federal statute.

No issue of federal law was presented to or decided by the New Mexico Supreme Court in this case. The basic facts of the case were outlined by petitioner in his Statement of the

Case. We repeat the facts necessary to the jurisdictional question. The United States, by 43 U.S.C.A. § 870 (1964), granted certain land to New Mexico subject to the requirement that when New Mexico disposes of any of the land all the minerals must be reserved to the State. If any of the land is disposed of by New Mexico "contrary to" that requirement, the United States Attorney General may seek forfeiture of such land back to the United States.

New Mexico sold one section of such land to respondents, under a 30 year purchase contract. Under the specific terms of the purchase contract "all minerals" were reserved to New Mexico. In this action, the

parties called upon the New Mexico courts to construe whether the mineral reservation included a reservation of sand and gravel. The New Mexico Supreme Court followed New Mexico common law in construing the mineral reservation to not include sand and gravel under the particular facts of this case. Respondents were therefore determined to be the purchasers of the sand and gravel as part of the property purchased under the purchase contract. The New Mexico Supreme Court did not decide that sand and gravel were <u>never</u> to be considered minerals, but only that under tests established by the Court in previous cases, sand and gravel having the characteristics of the material at issue in this case

were not minerals absent a contractual provision to the contrary.

The New Mexico Supreme Court also reviewed a factual issue as to whether the sale of the property, including the sand and gravel, had been conducted in compliance with the New Mexico Enabling Act, Ch. 310, § 10, 36 Stat. 557, 563 (1910).

Petitioner argues at p. 7 of the Petition for Writ of Certiorari that the decision of the New Mexico Supreme Court "failed to resolve the critical issue as to the disposition of sand and gravel with regard to" Section 10 of the New Mexico Enabling Act and 43 U.S.C.A. § 870. Petitioner did not argue at either the trial court or the New Mexico Supreme Court, and does not

appear to argue now, that federal law governs the construction of the reservation of "all minerals" in respondents' purchase contract. Petitioner argues only that because 43 U.S.C.A. § 870 requires New Mexico to reserve all minerals when selling tnese lands, the construction of such a mineral reservation should be the same as for a reservation of "coal and other minerals" in patents issued under the federal Stock-Raising Homestead Act, 43 U.S.C.A. §§ 291-301 (1964). Tne only reason urged for that proposition is petitioner's fear tnat if New Mexico law differs from federal law on this issue, even tnougn under a totally different statute, the United States Attorney General may seek

forfeiture back to the United States of lands granted to New Mexico by 43 U.S.C.A. § 870.

Petitioner points out that the United States Court of Appeals for the Tenth Circuit has determined that a reservation of "coal and other minerals" in a patent issued by the United States under the federal Stock-Raising Homestead Act does not reserve sand and gravel, and that this Court has granted a writ of certiorari to the Tenth Circuit Court of Appeals to review that decision. Petitioner then argues as follows:

> It is our contention that the ultimate decision made by this Court in Western Nuclear, supra, will control the result in the case at bar.

> Therefore, for this reason, they should be considered in conjunction with one another. If this court should find that gravel is a mineral under the mineral reservation of [sic] Stock-Raising Homestead Act of 1916, then this should be the interpretation given to the mineral reservation used by the State of New Mexico which has been required by 43 U.S.C.A., Section 870, 44 Stats. at Large 1026, Chapter 557. (Empnasis added.)
>
> p. 8, Petition for Writ of Certiorari.

The future United States Supreme Court decision in Western Nuclear v. Andrus, 664 F.2d 234 (10th Cir. 1981) cert. granted, will "control" the construction of the reservation of minerals in this case only if the construction of the mineral reservation

in respondents' purchase contract is clearly a question of federal law, rather than state law, and then only if federal decisions under the Stock-Raising Homestead Act are held to be applicable to the facts of this case and to govern the construction of contracts entered into pursuant to the New Mexico Enabling Act. Petitioner cites no authority for the proposition that the construction of this private contract is governed by federal law and, in fact, does not argue that the issue is one of federal law. As we stated above, petitioner urges only that the state law should be the same as federal law. This argument was long ago rejected by the United States Supreme Court in Miller's Executors v.

Swann, 150 U.S. 132 (1893) as not involving a federal question.

In Miller's Executors, the United States Supreme Court dismissed a petition for review of a decision of the Supreme Court of Alabama which construed both a state statute concerning lands originally granted to Alabama by the United States, and a mortgage held by the State on those lands. The United States Supreme Court discussed its lack of jurisdiction over such a case, as follows:

> The fact that the State statute and the mortgage refer to certain acts of Congress as prescribing the rule and measure of the rights granted by the State, does not make the determination of such rights a Federal question. A State may

prescribe the procedure in the Federal courts as the rule of practice in its own tribunals; it may authorize the disposal of its own lands in accordance with the provisions for the sale of the public lands of the United States; and in such cases an examination may be necessary of the acts of Congress, the rules of the Federal courts, and the practices of the Land Department, and yet the questions for decision would not be of a Federal character. The inquiry along Federal lines is only incidental to a determination of the local question of what the state has required and prescribed. The matter decided is one of state rule and practice. The facts by which that state rule and practice are determined may be of a Federal origin.
(Emphasis added.)

Miller's Executors, 150 U.S. at 136-137.

The reasoning of the United States Supreme Court in Miller's Executors is directly applicable to petitioner's argument in this case. Even if the New Mexico courts should look to federal decisions in construing the mineral reservation at issue in this case, a proposition with which we do not agree, the construction is not therefore an issue of federal law.

The fact that the property under consideration in tnis action was granted to tne State of New Mexico by the United States does not make tne construction of a subsequent purcnase contract between New Mexico and a private party a matter for federal law. Tne validity of 43 U.S.C.A. § 870, requiring a reservation of minerals, was

not and is not now challenged, nor is any construction of that statute brought into issue in this case. The New Mexico Supreme Court denied no right claimed under that federal statute. See Missouri Pacific Railway Co. v. Fitzgerald, 160 U.S. 556 (1896).

The issues in this case are similar to the issues in White v. Leovy, 174 U.S. 91 (1899), in which the United States Supreme Court reviewed a state court decision construing the extent of property granted by separate patents from the State of Louisiana to both parties to the action. The land at issue had originally been granted to Louisiana by the United States, and the first of the two subsequent patentees from Louisiana argued that his

patent covered accretions to the property and was therefore in conflict with (and superior to) the second patent. The Louisiana Supreme Court construed the two patents and determined the interests acquired by the two patentees. The United States Supreme Court pointed out that no federal question was involved in the state court decision, stating as follows:

> It is manifest no Federal question was passed on by the court. Its decision was put upon an independent ground involving no Federal question and of itself sufficient to support the judgment. It merely determined the extent of the grant to the State, and, interpreting the contending patents as conveyances, decided that the

> lands described in that of plaintiff did not embrace the lands in controversy, and that the lands described in that of defendant did embrace them. This was but the interpretation of written instruments, and if it were even apparent to us to be wrong, which we cannot say, we should nevertheless be without power to review it. (Emphasis added.)
>
> White, 174 U.S. at 95-96

This Court's jurisdiction over this case is distinguishable from the Court's jurisdiction over the issues raised in Western Nuclear. Western Nuclear involves federal court review of a federal administrative action brought by the United States Department of the Interior against Western Nuclear for trespass. Western Nuclear

was the successor in interest to the patentee of land from the United States under the Stock-Raising Homestead Act. The administrative action was brought by the United States against Western Nuclear for removing sand and gravel from the patented property. If a reservation of "all the coal and other minerals" in the United States patent to Western Nuclear's predecessor did not reserve the sand and gravel to the United States, Western Nuclear did not trespass on the United States' interest by removing sand and gravel from the property. That case is an action brought by the United States, for violation of the United States Materials Act of 1947, 30 U.S.C.A. § 601-604

(1976), involving a construction of a United States patent issued pursuant to the United States Stock-Raising Homestead Act.

In this case the state of New Mexico, not the United States, was the grantor of state land to respondents. The action was brought by respondents against the New Mexico State Highway Commission for alleged taking of sand and gravel from respondents' lands. The action was brought under a New Mexico statute creating a cause of action for inverse condemnation. The New Mexico Supreme Court decision in this action clearly treated the construction of respondents' purchase contract as a question of state law. The New Mexico Supreme Court decision

does not refer to any federal law with respect to that issue. The first question presented by the Petition for Writ of Certiorari is therefore a question solely of state law, over which this Court lacks jurisdiction.

The second issue raised by petitioner in the Petition for Writ of Certiorari was that the requirements of Section 10 of the New Mexico Enabling Act were not complied with in the sale to respondents. That issue involves only a question of fact which raises no federal question as to the validity of the New Mexico Enabling Act, and no right arising under that Act. This Court therefore has no jurisdiction to review that issue.

Petitioner has not complied with

Rule 21(h) of the Supreme Court Rules, which requires petitioner to specify in the statement of the case when and in what manner the federal questions sought to be reviewed were raised in the courts below. This Court can only have jurisdiction over a federal question "if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." Webb v. Webb, 451 U.S. 493, 496-497 (1981).

CONCLUSION

The United States Supreme Court does not have jurisdiction under 28 U.S.C.A. § 1257(3) to review the decision of the Supreme Court of New Mexico in this action, because the

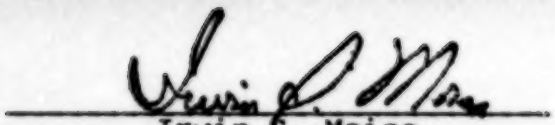
decision raises no question of federal law and the decision rests upon adequate state grounds. Even if a federal question is raised by the petition for writ of certiorari, no such question was urged before the New Mexico Supreme Court, or ruled on by that Court. Respondents therefore ask the United States Supreme Court to deny the Petition for Writ of Certiorari in this action.

Respectfully submitted,

SUTIN, THAYER & BROWNE
A Professional Corporation

By
Ronald J. Segel

and



Irwin S. Moise
Attorneys for Respondents
600 First Plaza
P. O. Box 1945
Albuquerque, New Mexico 87103
(505) 842-8200

CERTIFICATE OF SERVICE

We hereby certify that we have mailed three copies of the foregoing pleading to opposing counsel of record this 26th day of July, 1982.

SUTIN, THAYER & BROWNE
A Professional Corporation

By /s/ RONALD SEGEL